There is no universal model for structuring a contract. However, an "architectural analogy" has often been used to illustrate good contract drafting. The contract should be assembled according to a plan. This plan results in the drafter logically and clearly dividing the contract into coherent parts with appropriate captions. For example, a traditional structure for an agreement includes the following: (1) a title and description of the agreement; (2) a preamble in which the parties are listed and the intended undertaking is described; (3) a transition or words of agreement; (4) recitals; (5) definitions and operative clauses; (6) *testimonium* or closing. The transition expresses the words of agreement. It may be traditional legalese such as "Now, Therefore, in consideration of the mutual promises herein contained, the parties agree as follows" or simply, "the parties agree as follows." The recitals are statements of fact and usually give the background to the agreement. The recitals are what lawyers know as the "Whereas" clauses. This section is often overlooked at the drafting stage. It should be carefully drafted. Any misstatements of fact by either party in the recitals may be grounds for a future cause of action for misrepresentation or breach of warranty. The definitional section may be found in the recitals or in the body of the agreement. Lawyers at best do not spend sufficient time in drafting clear definitions for the terms of art being used in the agreement. At worst, the terms are given different meanings in different portions of the contract. One cardinal rule is to always change your words and language if you intend a change in meaning.

The operative clauses provide the body of the agreement. They are generally a mixture of highly negotiated and standard clauses taken from another form or model. The closing should clearly state the parties entering into the agreement. If the signatories are representatives of a company, then the type of company should be stated, along with the signatories' capacity to sign on behalf of the company. One final note: the effective date of the agreement should be clearly stated for purposes of calculating necessary time frames such as the expiration of the agreement. Contracts sometimes display a number of dates. There may be one stated in the caption, another date stated in a performance clause, and a different date stated in the closing. It is best to have a separate clause that gives the legal, effective date.

§2.15 CREATING A CONTRACT REVIEW CHECKLIST

It is prudent to develop a contract review checklist for the different types of contracts that are commonly used in a particular business.[62] This checklist can be developed using model forms, reviewing national and international contract principles, and by reviewing prior dealings. Examples of issues to be placed on the checklist include the following:

- Opening paragraphs or recitals should name the contract, define the contract, give the effective date, and name the parties. Example: "The above parties desire to enter into an Agreement for the purpose of ____."

62. The development of contract or contract clause checklist is common for transactional attorneys. *See* e.g., Jesse S. Ishikawa, *A Checklist for Drafting Easements*, 21 Prac. Real Est. Law. 7 (2005).

- Check individual state or foreign laws to determine if the given contract requires notarization or witnesses at the time of execution. If a corporate signatory is involved, is a corporate seal required?
- Has anything happened since the negotiations, such as the sending of a letter of intent or an "agreement in principle" that will need to be dealt with in the final contract? Other examples include the subsequent filing of liens or the commencement of litigation by third parties.
- Has an ADR clause been considered? Are there clearly stated choices of law and forum selection clauses?
- Does the contract settle the issue of assignment, transfer, or sublicensing?
- Were there any third parties involved in the negotiations, e.g., brokers? Does the contract provide for obligations to pay for their services?
- Does the contract provide for modifications or adjustments, especially in long-term contracts?
- Is there a liquidated damages provision? Is it reasonable? Is there a late payment penalty clause? Is it reasonable? Check relevant usury laws. Does the contract provide for specific performance?
- Does the agreement state that it is intended to be the entire agreement between the parties (merger or integration clause)?
- Has the contract been legally executed?
- Is there proper referencing of exhibits to the contract? Have the parties seen and approved of the exhibits attached or incorporated by reference?
- If a corporate signatory: Require proof of incorporation and/or certificate of good standing. Also, require a corporate resolution authorizing the representative to sign the contract on behalf of the corporation.
- Is there an expiration date requiring execution (signatures of all parties) by a certain date?
- Is the language gender-neutral?
- Are there adequate notice provisions?
- Are non-competition clauses reasonable as to scope, duration, and geography?
- Are there adequate confidentiality provisions?

The following items that deal with more substantive issues should also be incorporated into the checklist:

(1) If there are two language versions of the contract, the contracts should specify the version that is the authoritative copy.
(2) As a rule, a party should always add a choice of law and forum selection or arbitration clause to not only formal contracts, but also to letter agreements, telexes and other documents.
(3) If the parties select a third or neutral country law to apply, they should develop a reasonable relationship between the choice of law and the contract in order to assure that a court will honor their selection. Reasonable contacts include place of payment, place of negotiations, and place of execution.

controlled setting would be to provide for a pre-arbitration hearing in which the arbitrators may order a limited exchange of information including the production of requested documents, summaries of expected testimony of proposed witnesses, and depositions.

Remedies: The parties may want to restrict the type and amount of damages to be awarded through arbitration. For example, they may want to prohibit punitive damage awards or limit the amount of consequential damages. The clause may provide a "high-low" amount to which the arbitrator's award must conform. A high-low provision allows the parties to predict the greatest amount of damages that is likely to pay for breaching the contract.

Reasoned Awards: Most arbitration rules do not require the arbitrators to itemize their awards or to give reasons for their decisions. At the very least, however, most contestants would like an itemization of the award amount. In a case involving multiple issues of law and fact, a reasoned award may provide guidance for the future activities of the parties. However, unless the arbitration clause requires an itemized or reasoned award such information is not likely to be provided. The propensity of arbitrators is not to give detailed, written opinions. Such opinions are time consuming and may open the award to criticism. In order to receive a reasoned award, the clause should state that the award shall be in writing and shall specify all findings of fact and conclusions of law.

Consolidation Clause: The arbitration clause may provide for the consolidation of multiple parties' claims and arbitration proceedings. For example, a dispute in a foreign construction project may entail claims of the general contractor, subcontractors, suppliers, and the owner, along with architects, engineers, lending institutions, and insurance companies. One of the advantages of litigation is its ability to handle disputes involving numerous parties. Arbitration clauses must be custom tailored to deal with multiple party, multiple issue disputes. For example, most arbitration rules base the selection of arbitrators upon a two-party dispute. The United States Federal Rules of Civil Procedure 42(a) does authorize consolidation of multiple arbitration proceedings under the Federal Arbitration Act. However, it fails to adequately deal with the modification of procedural rules necessary to efficiently move from two-party to multiple party dispute resolution. Therefore, it is imperative for the arbitration clause to deal with the different procedural issues that multiple party disputes and consolidation generate.

The following is a single paragraph arbitration clause that in a succinct manner addresses a number of issues not dealt with in the common boilerplate clause:

> Any controversy, claim, or dispute arising out of, or relating to, this contract shall be resolved according to binding arbitration conducted in accordance with the Commercial Arbitration Rules of the American Arbitration Association then in effect. The decision of the arbitrator shall be final and binding on the parties and the award may be entered in any court of competent jurisdiction. The arbitrator shall not be authorized to award punitive damages. The costs of any arbitration, including the costs of the record or transcripts, administrative fees, attorney's fees, and any other fees shall be paid by the party determined by the arbitrator to not be the prevailing party or as otherwise allocated in an equitable manner as determined by the arbitrator.

The above clause strongly emphasizes that the parties are giving up any rights to appeal the arbitration decision and both parties expressly consent to the entry of an arbitration award "in any court of competent jurisdiction." The preclusion of punitive

damages is common and especially warranted in international contracts because of the fact that almost all legal systems do not recognize such damage awards. This clause also leaves the allocation of all costs related to the arbitration proceeding to the discretion of the arbitrator.

§3.20 INTERNATIONAL BAR ASSOCIATION GUIDELINES FOR DRAFTING INTERNATIONAL ARBITRATION CLAUSES

The Guidelines are the result of a project initiated by the International Bar Association (IBA)[54] Arbitration Committee drafted the Guidelines in 2008 in order to assist parties and their counsel to achieve effective arbitration clauses, which unambiguously embody the parties' wishes. They reflect the Committee's understanding of the best current international practices and provide both a framework and detailed provisions for drafters of international arbitration clauses.

The Guidelines tackle some of the more complex drafting issues, which arise when an arbitration agreement goes beyond the typical bipartite arrangement and involves multiple parties and/or a range of related contractual agreements. They address not only basic guidelines on the essential elements of an arbitration clause, but also in subsequent sections provide features which are considered "optional extras", as well as multi-tier dispute resolution clauses, multiparty arbitration clauses and arbitration clauses appropriate for transactions involving multiple contracts. A statement of each guideline is provided, supplemented with explanatory comments and including specific recommended clauses.

The IBA Guidelines provide as follows: (1) "Basic Drafting Guidelines" that list issues that should be dealt with in most arbitration clauses, (2) "Drafting Guidelines for Optional Elements," such as, confidentiality, document production, time limits, allocation of costs, and qualifications of arbitrators, (3) "Drafting Guidelines for Multi-Tier Dispute Resolution Clauses" (negotiation and mediation), (4) Drafting Guidelines for Multiparty Arbitration Clauses, and (5) Drafting Guidelines for Multi-Contract Arbitration Clauses.[55]

[A] Another Example of a Dispute Resolution Clause

The following dispute resolution clause does a lot in a small amount of space. First, it is a "med-arb clause" requiring negotiations between the parties followed by good faith mediation. If mediation fails then the dispute is referred to binding arbitration followed by a list of established arbitration panels and sets of arbitration rules. It also provides a list of convenient locations for the arbitration proceedings. It cautions that if London or another place in the United Kingdom is the chosen location the clause should

54. *See* http://www.ibanet.org (*Guidelines*) (accessed Oct. 7, 2010). Copies of the IBA Arbitration Clause Guidelines may be ordered from the IBA, and they are available to download at http://tinyurl.com/iba-Arbitration-Guidelines.

55. Copies of the IBA Arbitration Clause Guidelines may be ordered from the IBA, and they are available to download at http://tinyurl.com/iba- Arbitration-Guidelines.

Articles of Contract Law of China	*Commentary*
Article 110 Non-monetary specific performance: *except where: cost of performance is excessive.*	Adopts the civil law notion that specific performance is an ordinary remedy. In the common law only goods that are unique are subject to the remedy of specific performance.
Article 114 Liquidated damages: Where the amount of liquidated damages prescribed is *below the loss resulting from the breach, a party may petition the People's Court or an arbitration institution to increase the amount;* where the amount of liquidated damages prescribed exceeds the loss resulting from the breach, a party may petition the People's Court or an arbitration institution to *decrease the amount as appropriate.*	This is a vague rule on the enforceability of liquidated damages or penalty clauses. In general, they are enforceable, but either party can petition a court or arbitration institution to raise or lower the amount depending on the actual loss.
Article 115 Deposit: *If the party giving the deposit failed to perform its obligations under the contract, it is not entitled to claim refund of the deposit; where the party receiving the deposit failed to perform its obligations under the contract, it shall return to the other party twice the amount* of the deposit.	Adopts the civil law concept of deposit where if the breaching party is the party who provided the deposit that party loses its deposit; if the breaching party is the one holding the deposit, then that part must pay over twice the amount of the deposit.
Article 117 Force majeure: *Where an event of force majeure occurred after the party's delay in performance, it is not exempted from liability.* For purposes of this Law, force majeure means any objective circumstance, which is *unforeseeable, unavoidable and insurmountable.*	Two interesting variations in the force majeure rule. First, if the force majeure event happens during a delay in performance, then the delaying party loses its force majeure claim. Second, instead of the more common parameters for force majeure—not foreseeable, beyond control of party, and undue burden—it uses the terminology of unforeseeable, unavoidable, and insurmountable. A common sense interpretation of the later terms would make them equivalent to the more common terms.
Article 125 Contract interpretations; language versions: *In case of any discrepancy in the words or sentences used in the different language versions, they shall be interpreted in light of the purpose of the contract.*	Article 125 does not provide a rule for selecting the language of the contract if the contract is executed in different languages. It merely states that language aside the terms of a contract are to be interpreted according to the purpose of the contract. This rather amorphous rule suggests that a drafting attorney should insert an express "language of the contract" clause when the parties speak different primary languages.
Article 136 Delivery of Related Materials by Seller: In addition to the document for taking delivery, the *seller shall deliver to the buyer documents and materials related to the subject matter in accordance with the contract or in accordance with the relevant usage.*	Article 136 seems to place an additional duty on the seller in a documentary (sales) transaction. General contract law requires the seller only to provide the documents listed in the contract of sale. This Article implies that even if the documents are not required by the contract the seller must still supply the additional documents based on trade usage.

Articles of Contract Law of China	*Commentary*
Article 138 Time of delivery: Where the contract prescribes a period during which delivery is to take place, the seller may deliver *at any time during the delivery period.*	This Article gives the seller a great deal of discretion over when goods are to be delivered.
Article 215 Writing requirement: Where the *lease term is six months or longer, the lease shall be in writing.*	The American Statute of Frauds requires leases of twelve months or longer to be in a written form; Chinese law shortens the term to six months. The Stature of Frauds has been repealed in the United Kingdom.

In reviewing the above provisions two general comments can be made. First, the multitudes of sources that influenced the drafting of the CCL including, the civil law; to a lesser extent, the common law; American UCC, and most clearly the CISG and PICC. The second point is an offshoot of the first, businesspersons and their attorneys from Western legal systems should find the law easy to understand.

§5.13 STANDARD TERMS OR GENERAL CONDITIONS: PECL AND GERMAN BGB

An important concept not familiar to most common law practitioners is legislative regulation of standard form contract terms.[151] The phrase "general conditions" is commonly used interchangeably with standard terms. The primary aim of mandatory terms laws is that of consumer protection, but, as in the case of the Principles of European Contracts (PECL), they may also be applied to commercial contracts. The next two sections will review the standard term provisions of PECL and the German Civil Code.

§5.14 PRINCIPLES OF EUROPEAN CONTRACT LAW

The *Principles of European Contract Law* or PECL[152] stated purpose is to respond to a "need for a Community-wide infrastructure of contract law to consolidate the rapidly expanding volume of Community law regulating specific types of contracts."[153] Article 1.101 states that PECL applies to a contract dispute in two main scenarios: the parties' selection of it as their choice of law and when the contract is to be governed by general principles of law or the *lex mercatoria*. The second scenario is likely to occur in the

151. *See* generally, Larry Bates, *Administrative Regulation of Terms in Form Contracts: A Comparative Analysis of Consumer Protection*, 16 Emory Int'l. L. Rev. 1 (2002) (surveying law in Germany, Sweden and the United Kingdom, as well as the law of Israel); James R. Maxeiner, *Standard-Terms Contracting in the Global Electronic Age: European Alternatives*, 28 Yale J. Int'l. L. 109 (2003).
152. *See* generally, Ole Lando & Hugh Beale (eds), *Principles of European Contract Law* (Kluwer L. International 2000).
153. The *Principles of European Contract Law* may be accessed at www.jus.uio.no/lm/eu.contract.principles.1998/doc.html.

grant the agent a right upon the termination of the agency relationship to either an *indemnity* payment (based upon the length of the relationship, along with the level of past performance) or a claim for damages (anticipated costs due to termination). Laws of the foreign country of the commercial agent need to be researched "to ensure that nothing contained in a commercial agency contract is repugnant to imperative [mandatory] provisions"[9] of any law applicable to the contract. Even if the contract is enforceable as written, foreign tax and termination laws will need to be studied in order to avoid their application to the principal. The use of foreign counsel is required in order to avoid such liability traps. The clearest example of this is the application of foreign tax liability to the principal:

> In many countries a non-resident principal will be liable for tax if its agent has, and habitually exercises, a general authority to negotiate and conclude contracts on behalf of the principal. For instance, when a principal appoints an agent in a foreign country, with a fixed office therein and with power to make contracts on his behalf, the principal may be deemed to be carrying on business in that foreign country and be taxed accordingly.[10]

The ICC *Guide* can be used as a checklist in order to draft an agency contract. The following summary of the *Guide* illustrates the types of issues that an international agency contract should address:

- *Independent Contractor Status:* The heading of the agreement should clearly state that it is a commercial agency contract. In order to be absolutely clear as to the intended contractual relationship, the heading and preamble should state that it is an independent contractor arrangement.
- *Identity, Capacity, and Status of Parties:* The nationality and legal form of each party should be stated, along with the foreign entity's capacity to act as a commercial agent. For example, in some countries only nationals may act as agents and in others commercial agents must be registered with the government.
- *Assignments:* Generally, the parties intend that their contract is not subject to assignment and thus, the contract should state that it is not to be assigned. If the parties intend to allow assignment, the contract should state the conditions and procedure for assignments.
- *Language of the Contract:* If the contract is written in two languages, it should state which language is to control in the enforcement of the contract. If both languages are to control, it would be prudent to have an expert carefully review the translation.
- *Dates of Commencement and Expiration:* Since there may be a lag between the first and second signature to the contract or between execution and when the relationship is to be commenced, the contract should expressly state the commencement and expiration dates of the contract.

9. *Ibid.* at 6. For example, in Belgium if the contract subordinates the agent to the authority of the principal, then there is a legal presumption that an employment relationship has been formed. However, this presumption can be overcome if the agent is a corporate entity. *Ibid.* at 6, n. 1.
10. *Ibid.* at 7.

- *Products:* The contract should be clear regarding the products that are to be sold on behalf of the principal. If the principal produces different classes of products, then the contract should state which classes are the subject of the agency contract. If the products have different uses, the contract should state for which uses the products are to be marketed and sold. The contract should also address the issue of the development of new products or subsequent improvements of the products listed in the contract. It should state whether the agent will have rights to sell those products. The parties may also consider minimum or maximum amounts of the products to be supplied by the principal.
- *Agency Territory:* The contract should precisely delineate the sales territory that is being assigned to the agent. A restriction may be placed upon the sales to third parties who are likely to export the goods to another territory. Host country laws should be reviewed to see if territorial restrictions will violate anti-competition laws.
- *Exclusivity:* The parties should agree as to whether the contractual territory is being given exclusively to the agent. It should also state any rights reserved to the principal to operate within the territory as some foreign buyers may contact the principal directly or may want to only deal with the principal. The agreement should provide the relative rights of the principal and the agent in such situations.
- *Solicitation of Customers:* The parties should agree to the groups to be targeted by the agent as potential customers. Also, the parties should append a list of customers, if any, in which the principal has previously done business within the contract territory.
- *Acceptance of Orders:* The agreement should clearly state whether the agent has the authority to bind the principal. However, if the agent is authorized merely to pass on orders, then the principal is generally free to accept or reject them. A notice provision setting a reasonable time for the principal to advise the agent of its decision should be incorporated into this provision.
- *Promotional and Sales Information:* The contract should stipulate the manner in which the agent shall be kept informed of the principal's sales policy, particularly with regard to any visits the principal may make to customers within the contractual territory and to what extent the principal is obligated to send copies of correspondence, documentation, and invoices exchanged between the principal and customers or potential customers. The clause should provide the manner in which the principal is to notify the agent of any changes in its price structure, terms of delivery, terms of payment or standard conditions of sale. It should also stipulate when such changes will become effective in the contract territory.
- *Manufacturing Licenses:* The agreement should define the rights and obligations of the parties in the event that the principal licenses with a third party to manufacture the goods within the territory of the agency contract.
- *Intellectual Property Rights Infringement:* The relative responsibilities of the parties as to infringement of intellectual property rights should be defined. For

application of private international (conflict of law) rules.[9] For example, the Brussels Regulation prescribes that if the agent has authority to bind the principal, the third party may bring an action against the principal in the state where the agent is registered or carries on business. The minimum threshold for the negotiation is whether the commercial agent contributes to the creation of goodwill for the principal. It is also of crucial importance that the commercial agent acts for and on behalf of the principal, and not on its own behalf, in order to be protected under the Directive and entitled to compensation.[10] In German law, the indemnity depends on the commercial agent bringing in new clients or substantially increasing the business conducted with existing ones. The same applies to all the Member States, which have opted for the indemnity option.[11]

[D] Goods versus Services

The Directive only covers contracts for the sale (or purchase) of goods, but it does not preclude Member States from widening their implementation of the Directive to include services as well, which several Member States have done (Germany, Austria, Belgium, Spain, France, Italy, Luxembourg, Holland, and Portugal). As the Directive is silent as to what constitutes goods, there may well be differences of interpretations between Member States. Of particular interest is the field of energy and software contracts. On the former, the European Court of Justice (ECJ) held that electricity constitutes goods.[12] In the United Kingdom, gas constitutes goods for the purpose of the Directive.[13] The sale of software alone is covered but not the license of software.[14] However, a supply of software with a perpetual license is treated as a sale of goods.[15]

[E] Express Exclusions

The Directive gives Member States the option to stipulate that commercial agents whose activities are secondary will not be protected.[16] France, the United Kingdom, and Germany have elected to opt-out, but have different interpretations as to what amounts to a secondary activity and have done so for different reasons.[17] The United

9. *See* Art. 5, Council Regulation 44/2001 on the Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters. *See* C-420/97 *Leathertex Divisione Sintetici SpA v. Bodetex BVBA* [1999] 2 All ER (Comm) 769.
10. Article L 134-4 al 1 French Comm C, *Sagal (t/a Bunz UK) v. Atelier Bunz GmbH* [2009] EWCA Civ 700, [2009] Bus LR 1527.
11. *Cass Com 21-6-2011 SFR* (No. 10-18.577 (merely advising potential clients); *Nigel Fryer Joinery Services Ltd & Anor v. Ian Firth Hardware Ltd* [2008] EWHC 767 (Ch); [2008] 2 Lloyd's Rep 108.
12. Case C-393/92 *Almelo v. Energiedbedriif Ijsselmij* [1994] ECR I-1477.
13. *Tamarind International Ltd v. Easter Natural gas (Retail) Ltd* [2000] CLC 1397.
14. *London Borough of Southwark v. IBM UK Ltd* [2011] EWHC 549, (2011) 135 Con LR 136.
15. *Fern Computer Consultancy Ltd v. Integraph Cadworx & Analysis Solution Inc* [2014] EWHC 2908 (Ch); [2014] Bus LR 1397.
16. Article 2(2).
17. Article L 134-15 French Comm C; §92 German Comm C and for the UK, regulation 2(3) and the schedule. *See* S Saintier, *The Interpretation of Directives to Suit Commercial Needs: A Further Threat to Coherence*, J. Bus. L. 130, 130 (2012) (France did so to protect motor agents and Germany did so to protect the insurance agents).
18. Regulation 2(1).
19. *Lloyd Gailey v. Environmental Waste Control* [2004] Eu LR. 423. Followed in *Crane v. Sky In-Home Services Ltd* [2007] EWHC 66 (Ch), [2007] All ER (D) 220.
20. Directive Art. 13(1).
21. Article L 134-15 French Comm C.
22. *See* Council Directive EC 86/653 of Dec. 16, 1986 Regarding Commercial Agents, OJ L 382, 31/12/1986 P. 0017–0021.
23. Goyder, (n.178) 73.

Kingdom's Agency Regulations only apply to the sale of goods.[18] This raises a problem of interpretation for mixed contracts (supply of goods and services). The English and Scottish courts apply the rules to secondary activities, if the primary activity generates goodwill.[19]

[F] Registration of the Commercial Agent

The Directive applies even when no formal contract is signed except for Greece and Ireland where a written agreement is still required.[20] Under the law of Luxembourg, a written contract is preferred, but proof can be established through various means. Although in most Member States the commercial agent will be protected even when there is no contract in writing, it is nevertheless advised to do so for the validity of non-competition clauses in France, Germany and the United Kingdom. In addition, in France, the exemption from protection of the Directive when the activities of the commercial agent are secondary must be in writing.[21] Several Member States require commercial agents to register. In the case of *Caprini v. CCIA* (case C-485/01), the ECJ upheld the appropriateness of registration requirements when it stated that as long as non-registration does not "affect the validity of an agency contract" and that the consequences of a non-registration does not "adversely affect in any other way the protection which the Directive confers on commercial agents."

§9.02 FOREIGN COMPETITION LAW

Contractual restrictions on the rights of the distributor, agent, or licensee are dealt with in a number of different ways under national laws. The developing countries look with skepticism on any such restrictions and generally will not enforce restrictive contract provisions in their courts. Other countries prohibit only certain types of clauses such as non-reciprocal grant back clauses. Most developed countries allow the contracting parties full freedom to contract and will enforce most restrictive clauses. The main exception is that certain restrictions will be scrutinized under antitrust or competition laws. Some forms of exclusivity may be deemed to be anti-competitive. In addition, EU agency laws are highly protective of their citizens that act as foreign agents. These laws should be consulted before drafting agency contracts.[22]

Agency and distribution agreements are called *vertical agreements* because they are made between parties operating at different levels of the supply chain.[23] Although

forum selection clause that states otherwise. The preferred means of dispute resolution is arbitration.

§9.09 OTHER EXAMPLES OF CONTRACT TERMS

Below find some of the typical clauses found in distribution agreements, including examples of such clauses. Early in the agreement, there is generally a delineation of the scope and limitations of the rights being granted to the distributor. The grant clause acts in the same way as the grant clause found in licensing agreements. In truth, distribution agreements often are licensing agreements. In the following analysis the Manufacturer-Licensor is designated as the "Company" and the Licensee-Distributor as the "Distributor." This agreement is decidedly pro-Company and will need to be adjusted based on the relative bargaining power of the parties and the commercial agency laws of the pertinent foreign countries.

[A] General Terms

Other than the specific terms, a host of general or boilerplate terms need to be incorporated into the distribution agreement. The following is a non-comprehensive list of general terms:

- *No Agency-No Partnership Clause.* The relationship between the Company and Distributor under this Agreement is that of seller and buyer. Distributor is, and shall remain, an independent contractor. This Agreement does not create any partnership, joint venture, association or syndicate among or between any of the parties. Decisions made by Distributor regarding a customer's credit and all matters relating to billing and invoices to customers shall be made by Distributor and at Distributor's sole and exclusive risk.
- *Merger Clause.* This Agreement sets forth the entire and final agreement and understanding of the parties with respect to the subject matter of this Agreement. Any and all prior agreements, understandings or undertakings, whether written or oral, with respect to the subject matter of this Agreement, are terminated. This Agreement may not be modified or amended except by an instrument in writing executed by the parties to this Agreement.
- *No Waiver.* No waiver, forbearance or failure by any party of its right to enforce any provision of this Agreement shall constitute a waiver of such party's right to enforce any other provision of this Agreement or such party's right to enforce such provision in the future.
- *Invalidity.* The invalidity or unenforceability of any provision of this Agreement shall not invalidate the remaining provisions of this Agreement.
- *Notice.* Unless otherwise specified herein, all notices, requests, demands, offers, claims and other communications shall be in writing and shall be deemed duly given upon actual receipt, and shall be delivered as follows: (i) in person; (ii) by registered or certified mail postage prepaid, return receipt requested; (iii) by a generally recognized express air courier service which

provides written acknowledgment by the addressee of receipt; or (iv) by facsimile or other generally accepted means of electronic transmission.

- *Force Majeure.* Failure of any of the provisions of this Agreement, except the payment of money, by reason of manufacturing capacity limitations, acts of governmental authority, strikes, labor stoppage or slowdown, shortage of energy, inability to obtain packages, acts of God, or any other cause, natural or otherwise, beyond either party's reasonable control shall not constitute an event of default or breach of this Agreement. If Licensed Products are unavailable due to any of the foregoing, Company shall not be compelled to honor previously accepted orders, but shall attempt to distribute available Licensed Products among all Distributors in a fair and equitable manner.
- *Currency.* All prices of Licensed Products and all payments made under this Agreement are quoted and shall be made in United States Dollars. In the event that any payment is received by the Company net of wire transfer fees, currency conversion charges or other fees or charges of whatever type or nature and whether imposed by the Distributor's financial institution or the Company's, Distributor shall be responsible for all such fees and charges.
- *Anti-Contra Proferentem:* This agreement has been fully reviewed and negotiated by the parties hereto and their respective counsel. Accordingly, in interpreting this agreement, no weight shall be placed upon which party hereto or its counsel drafted the provision being interpreted.
- *Legal Compliance and Foreign Corrupt Practices Act Clause.* Distributor agrees to comply with all applicable laws and regulations that may pertain to the sale or distribution of the Products pursuant to this Agreement. Distributor represents, warrants, and covenants that it is familiar with 49 U.S.C. §78 dd-1, et seq., (the "Foreign Corrupt Practices Act") and that it will comply with the provisions of this law.
- *Key Personnel Clause.* Distributor acknowledges that the Company is making this appointment based on its confidence in and reliance on the personal experience and abilities of _____.

[B] Grant Clause

The following grant clause expressly states that the distributor is receiving a non-exclusive right, but then provides that it will be partially exclusive for the authorized territory as long as the distributor reaches certain benchmarks. The clause disclaims any liability in the event another distributor imports the licensed products into the distributor's authorized territory:

- *Grant.* Company grants, and Distributor accepts, on the terms and conditions of this Agreement and for so long as Distributor is in full compliance with the terms and conditions of this Agreement including, the reaching of Minimum Sales Requirements. The Distributor is being granted a non-exclusive right during the Term to distribute and sell the Licensed Products to the Authorized Territory. The Company covenants that it will not appoint another distributor

Exhibit 10.2 Summary of Intellectual Property Law

US Law Patent Law	*Most Other Countries*
Grants a patent to the first inventor; Law amended in 2011 to first to register	Awards the patent to the inventor who first files (registers)
One-year protection prior to patent application (inventor may disclose the invention prior to filing a patent application)	No such period
No duty to work (no compulsory licenses issued by government)	Duty to work invention (compulsory licenses)
Must obtain license from US Patent & Trademark Office *before* filing abroad	N/A
Recognizes the patentability of business methods	Does not recognize or have additional requirements
Trademark Law	
Recognizes words, symbols, service marks, collective marks, and trade dress	Some countries do not recognize service marks.
Obtained by use or registration	Registration only
Copyright Law	
Original works of authorship include literary, dramatic, musical, artistic, and computer programs	Varies
No formalities required	Some countries require certain formalities
Recognize foreign copyrights	Some countries do not protect works of foreign nationals

National intellectual property laws vary substantially in substance and even more in the areas of enforcement and remedies. As a matter of terminology, some countries still use the older nomenclature of "industrial property." One explanation of the differences in meanings of the terms industrial property and intellectual property follows:

> Industrial property is a term disappearing from Anglo-American legal terminology. It used to include the protection of inventions, industrial designs, and trademarks. Copyright in contrast designated the system for protection of literary and artistic works. This dichotomy has now broken down. Many countries have entered the postindustrial era, where the line between goods production and information production is increasingly blurred. Copyright protects purely utilitarian items, such as computer operating systems; patent protects quite abstract ideas for ways of doing business. Trademarks have taken on functions quite different from their traditional role of identifying producers of goods. For instance, trademark owners sell their marks as decorations for T-shirts. English-language terminology has also changed. The broader and more attractive term intellectual property has become

> the designation for the combination of what used to be industrial property, copyright law, and other related fields.[3]

It is important to see how patent and copyright laws interrelate in the foreign country of interest. Because of lax enforcement, some IPR owners have used creative methods to protect their property. One technique used is to track down the counterfeiters and sign them as legal licensees.

§10.03 PROTECTING YOUR PRODUCT FROM IPR INFRINGEMENT

In some countries, protection of IPR is hampered by inadequate enforcement of relevant laws and regulations. Foreign companies must be vigilant in protecting their products from IPR infringement. Occasionally, foreign companies work with local law firms and law enforcement officials to conduct police raids on counterfeiters. Others conduct periodic seminars on the adverse effects of IPR infringement, which includes reduced investment by foreign companies.

Ultimately, the course taken by companies to protect their IPR will depend on their product. Some computer software companies provide free training and sell their software at competitive prices, while warning that copies of their product may contain damaging viruses. Also, companies with well-known trademarks must be vigilant in defending their marks by registering them early and seeking a cancellation of an unauthorized registration. In general, acquiring a strong local partner or agent can help in protecting trademarks and intellectual property, as long as the arrangement remains amicable.

The intellectual property law regimes in former Soviet-bloc countries need to be highly scrutinized. The former inventor's certificate system that gave recognition to an inventor, but did not grant a monopoly on profits from the invention, has been mostly abandoned. In response, these countries have adopted Western-style intellectual property laws in a somewhat bifurcated manner. Often their laws begin with a full recognition of international conventions like the Paris Convention, Berne Convention, PCT, and Universal Copyright Convention. Since these conventions provide minimum standards, an upgrading through domestic legislation is needed to provide the higher standards found in most legal regimes of developed countries. Unfortunately, the court systems in these new democracies, and in less developed countries, are not well equipped to handle claims of intellectual property infringement. Upon recognizing an infringement, the lack of appropriate remedies or the preference of not imposing harsh remedies or damages results in under-enforcement. The under-enforcement of substantive intellectual property protection laws is not a phenomenon unique to developing countries or former Soviet-bloc countries. For example, the US Trade Representative placed Italy on its IPR "watch list" under section 301 of the United States Trade Act

3. Peter B. Maggs, *Industrial Property in the Russian Federation*, in *The Revival of Private Law in Central and Eastern Europe* 377, n. 1 (George Ginsburgs, Donald D. Barry & William B. Simons eds, 1996).

to the representative office. The Guide advises that the management agreement be as comprehensive as possible and clearly formulate the remuneration to be paid to the agent. The foreign entity may elect to establish its own *representative office*. This still entails appointment of an Indonesian company or citizen to act as a representative. A business permit is required which usually entails numerous fillings with a number of government agencies including, registering the legal entity with the Indonesian government. The activities of a representative office are limited to signing sales contracts, collecting payments, and other general business activities.

§11.02 DEFINING JOINT VENTURE[5]

A simple definition of joint venture is "a contract that creates a partnership for the purpose of performing some kind of business operation."[6] The joint venture is an elastic vehicle for doing business and can take numerous forms. For example, the parties can enter into an agreement to work together in order to achieve certain business goals as joint venturers or they can agree to create an entirely separate entity, such as a corporation or limited liability company, in order to transact business. The following definitions[7] describe two of the common uses of the joint venture vehicle for conducting international business: (1) *Single Project* Joint Venture in which a number of parties or companies agree to enter into a partnership in order to develop specific business opportunities with a single, identifiable goal. These single project joint ventures generally have a relatively short life span; (2) *Business Alliance* Joint Venture: This type of joint venture envisions a more fluid, long-term business relationship. The core issues in the partnership agreement include the scope of the business enterprise, the capitalization of the venture, the organization and management of the venture, and the termination of the business.

A major concern in most joint venture agreements is providing the mechanisms for decision-making. The most obvious risk in joint venturing is the uncertainty and unpredictability of developing a new business or project. The joint venturers may disagree on how best to deal with post-formation events, especially those that were not foreseeable. It is important, especially in the long-term joint venture agreement, to provide a mechanism to prevent decisional deadlock.

5. The term "joint venture" is not legally defined in numerous foreign legal systems. One important exception is the European Union which has adopted rules for joint ventures. Therefore, there is often no foreign joint venture law. It is important to research foreign law to familiarize oneself with the forms of doing business recognized under the national law that can be utilized to approximate the joint vehicle concept.
6. William R Fox, Jr., *International Commercial Agreements: A Primer on Drafting*, Negot. & Resolving Dis. 79 (1992).
7. *See*, Mark Pery-Knox-Gore, *Joint Ventures*, in *Structuring International Contracts* 87 (Dennis Campbell ed., 1997).

§11.03 SELECTING THE ORGANIZATIONAL ENTITY[8]

The first issue to be determined is the national law under which the joint venture should be created. Tax considerations will often play a major role in this determination. For example, transfers of assets or stock by a US entity to a non-US entity is treated as corporate transaction for US tax purposes. Under US law, joint venture organizers have the choice of the corporate, partnership, and limited liability company forms of doing business. Corporations provide limited liability, subject to "piercing the corporate veil" and other theories of shareholder liability. However, it is also treated as a separately taxable entity. The general partnership form provides for unlimited liability. But, limited liability may be achieved by having each partner form a special purpose corporate subsidiary to be a general partner in the partnership or by using a limited partnership with a special purpose corporate subsidiary as the general partner. The limited partnership, as well as the general partnership, allow for the pass-through of profits and losses for US federal, state and local income tax purposes. The limited liability company provides for the pass-through of profits and losses for US federal, state, and local income tax purposes.

The most common forms of joint venture governance are *managing joint venturer* and the *management committee* form of governance. In the managing joint venture form, the operating joint venture agreement grants one of the joint venturers the authority to manage the joint venture. The power of the managing joint venturer can be broadly defined. Specific restrictions on the power of the managing joint venturer may be limited to extraordinary transactions such as sale of all or substantially all assets of the joint venture. Alternatively, the power of the managing joint venturer may be defined more narrowly, such as the power to direct the operation of the day-to-day business and affairs of the joint venture.

The management committee form may include the use of a managing joint venturer. If the board or management committee form of governance is selected, then the agreement needs to deal with the following issues: the composition of the board or committee, ability of members to give proxies or appoint temporary substitutes, frequency of meetings, notice and quorum requirements, whether physical attendance is required, and what matters require a vote of the board or committee. Matters specifically requiring approval could include some or all of the following: approval of the annual budget, material deviations from the annual budget or business plan, material capital expenditures, incurrence of indebtedness above a specified amount, granting of liens on assets, joint venturer funding calls, loans to third parties other than in the ordinary course of business, affiliate transactions above a specified amount, termination of significant numbers of contributed employees of non-managing joint venturer, distributions, merger or consolidation involving any change in ownership of the joint venture, significant asset acquisitions or dispositions other than in the

8. The material on "selecting the organizational entity developing a joint venture agreement checklist, generic joint venture provisions, and operating joint venture agreement was taken from materials provided by Andrew J. Markus, Carlton Fields, P.A., 100 SE 2nd Street, Suite 4000, Miami, Florida 33131.

freely accepted by the contracting parties."[68] This propensity for the strict enforcement of contracts is also seen in French and civil law's willingness to enforce penalty clauses, which are generally unenforceable in the common law. French Civil Code Article 1226 states that: "A penalty is a clause by which a person, in order to ensure performance of an agreement, binds himself to something in case of non-performance." In the common law, the liquidated damages clause is aimed at compensating the non-breaching party. If the aim is to encourage or "ensure performance" it is generally held to be an unenforceable penalty clause.[69]

[3] American Uniform Commercial Code

The Uniform Commercial Code (UCC) contains a number of provisions that can be seen as directed at regulating longer-term contracts. The UCC recognizes the enforceability of contracts that fail to fix a contract price as an "open price" contract:

> §2-305. Open price term
>
> (1) The parties if they so intend can conclude a contract for sale even though the price is not settled. In such a case the price is a reasonable price at the time for delivery, if
> (a) Nothing is said as to price; or
> (b) The price is left to be agreed by the parties and they fail to agree; or
> (c) The price is to be fixed in terms of some agreed market or other standard as set or recorded by a third person or agency and it is not so set or recorded.
> (2) A price to be fixed by the seller or by the buyer means a price for him to fix in good faith.
> (3) When a price left to be fixed otherwise than by agreement of the parties fails to be fixed through fault of one party the other may at his option treat the contract as cancelled or himself fix a reasonable price.

In exclusive agency and distribution contracts, the UCC recognizes a duty to use best efforts of the seller and buyer in the performance of the contract.

> §2-306(2): Exclusive dealings
>
> A lawful agreement by either the seller or the buyer for exclusive dealing in the kind of goods concerned imposes unless otherwise agreed an obligation by the seller to use best efforts to supply the goods and by the buyer to use best efforts to promote their sale.
>
> Parties are obligated to cooperate in each other's performance, such as providing specifications of the goods within a reasonable period of time.
>
> §2-311: Options and cooperation respecting performance
>
> An agreement for sale that is otherwise sufficiently definite to be a contract is not made invalid by the fact that it leaves particulars of performance to be specified by one of the parties. Any such specification must be made in good faith and within limits set by commercial reasonableness.

68. Cass. civ., Mar. 6, 1874, D.P. I, 179 (1876).
69. Recently there has been a loosening of the common law's penalty rule in the United Kingdom. See *Cavendish Square Holding v. Talal El Makdessi* and *ParkingEye Limited v. Beavis*, [2015] UKSC 67

[4] Chinese Contract Law

Chinese Contract Law (CCL) recognizes the general principles of fairness and good faith: (1) "The parties shall abide by the principle of fairness in prescribing their respective rights and obligations (Article 5)" and (2) "The parties must act in accordance with the principle of good faith in exercising rights or in performing obligations (Article 6)." In long-term supply or installment contracts, CCL, as does the American UCC, allows for termination of a contract if non-delivery or defective delivery of an installment is fundamental or frustrates the purpose of the entire contract:

> Article 166: Effect of termination in case of delivery in installments
>
> If the seller's failure to deliver or non-conforming delivery of one installment frustrates the purpose of the contract in respect to subsequent installments the buyer may terminate the portion of the contract in respect of such installment as well as any subsequent installments.

Unlike American law, the CCL provides a unique rule that if the buyer fails to make timely payment of a certain portion of the contract practice the seller may terminate the entire contract: "Where the buyer is making payment by installments fails to pay the price due and the amount unpaid accounts for *one fifth* of the whole price, the seller may request the buyer to pay the whole price or may rescind the contract. Where the seller rescinds the contract, the seller may request the buyer to pay for the use of such object (Article 167)."

[5] Summary of Law in Relation to Long-Term Contracts

National laws are consistent in indirectly dealing with issues particular to long-term contracts. For example, provisions dealing with defective installments under a single contract implicitly recognize the long-term supply contract. The general rule is that a defective part performance or installment is considered a breach of only of that installment and not of the whole contract, unless the breach of an installment substantially impairs the value of the whole contract. In the latter case, the breach of a part or installment is there is a breach of the whole. The issue of whether the parts of a contract can be treated as independent contracts is in some laws determined by the *divisibility* of the contract parts. For example, Article 1142 of the French Civil Code states that "an obligation is divisible or indivisible according to whether its object is a thing which in its delivery, or an act which in its performance, is or not susceptible of a division either physical or intellectual." Another factor noted in the CCL is whether the parts or installments are of the same goods (fungible) or vary in their content. Article 165 states:

> Where the subject matter comprises a number of components, the buyer may terminate the portion of the contract in respect of such component, provided that if severance of such component with the other components will significantly

The confidentiality and non-use obligations of this Confidentiality Agreement shall not apply to:

(a) Information, which at the time of disclosure is in the public domain.
(b) Information, which after its disclosure hereunder, becomes part of the public domain by publication or otherwise, except in breach of this Confidentiality Agreement.
(c) Information, which the receiving party can establish by reasonable proof was in its possession at the time of disclosure or was subsequently and independently developed by its employees who had no knowledge of the Information disclosed.
(d) Information, which the receiving party receives from a third party, provided however that the said third party did not obtain such information, directly or indirectly, from the disclosing party under conditions of confidentiality.
(e) Information which is required by law, regulation or order of a competent authority to be disclosed by the receiving party, provided that, where practicable, the disclosing party is given reasonable advance notice of the intended disclosure.

The clause should also provide for remedies in case of breach. One special remedy for breach of confidentiality agreements is *disgorgement* or *accounting of profits*. An English court has recognized the use of this remedy for breach of confidentiality or infringement of intellectual property rights and trade secrets. The Court in *Peter Pan Manufacturing Corporation v. Corsets Silhouette Ltd*[7] held that a party who makes a profit from a breach of confidence maybe liable to account for this profit to the obligee. Such a remedy would be appropriate in the case where the breaching party had manufactured and sold goods knowingly using confidential information, which it had obtained from the disclosing party.

§13.11 CONTRACTUAL RESTRICTIONS: IPR, CONFIDENTIAL INFORMATION, AND PRODUCTS LIABILITY

Contractual restrictions on the use of confidential information by importers or distributors are dealt with in a number of different ways under national laws. The developing countries look with skepticism on any such restrictions and generally will not enforce restrictive contract provisions in their courts. Other countries prohibit only certain types of clauses such as non-reciprocal grant-back clauses (improvement of technology or product by licensee or distributor). Most developed countries allow the contracting parties full freedom to contract and will enforce most restrictive clauses. The main exception is that certain restrictions will be scrutinized under antitrust or competition laws. Some forms of exclusivity may be deemed to be anti-competitive. In addition, EU agency laws are highly protective of their citizens that act as foreign agents. These laws should be consulted before drafting agency contracts.[8] The following clauses need to be carefully drafted to be legally enforceable in certain countries: Grant back, Price-fixing,

7. [1964] 1 WLR 96.
8. *See*, EU Council Directive Regarding Commercial Agents, Council Directive 86/653.

Non-competition, No-Challenge, Quantity Limitations, Field-of-Use restrictions, Quality Controls and Tying clauses.

Non-competition and *validity* or *no-challenge clauses* are susceptible to non-enforcement. Validity or no-challenge clauses prohibit the importer-purchaser from challenging the exclusiveness or validity of the seller's intellectual property rights. No-challenge clauses are unenforceable under some antitrust or competition law because of the notion that a party should have a right to challenge a patent that it believes to be fraudulent or inappropriate.

Exporters often attempt to prevent *gray market* problems by negotiating *field-of-use* and *quantity restrictions* into distribution agreements. Japan's *Antimonopoly Act Guidelines for International Licensing Agreements* expressly permits such restrictions as a proper exercise of statutory patent, copyright and trademark rights. The *Guidelines* permit limitations on field of technology and quantity of of sales. It allows the licensor to "restrict the amount of output or the amount of sales of patented goods."[9] The EU provides a *block exemption* that allows for such limitations. The distributor can be prohibited from actively selling outside of its contractual territory. However, it cannot be prohibited from filling orders passively acquired. These restrictions may carry over to the post-contract phase when the importer-distributor retains an inventory of the goods at the time of termination.

The contract should provide for the disposition of distributor's inventory of products or spare parts upon termination. It should provide for the price to be paid by the manufacturer if it is required to buy back stock (French law). Another clause should deal with the termination of the distributor's use of the manufacturer's intellectual property rights. The distributor should be required, on termination of the agreement, to cease using the name and trademarks of the exporter and to cooperate in the cancellation of any user registrations. This clause should provide for a return of any sensitive materials and post-termination confidentiality. Another provision may require the terminated distributor to cooperate in the transfer of after-sales service (parts, technical assistance and guarantee servicing) to a new distributor. The provision below deals with the issues of outstanding orders and inventory at the time of termination. It requires the seller to honor certain orders, for the seller to repurchase inventory held by the distributor, and for the distributor to destroy any goods not in good condition:

> *Orders, Repurchase, and Set-Off upon Termination*: Upon termination of this Agreement, the Seller will honor all orders accepted and acknowledged by Seller that remain unfulfilled as of the effective date of termination. The Seller may refuse to accept any other orders pending as of such date. In addition, at the option of the Seller and upon notice to Distributor, Distributor shall resell to the Seller and the Seller shall repurchase from Distributor, all or any portion of the Products then in good condition at the net purchase price actually paid by Distributor to the Seller for such inventory, and the Distributor shall thereupon ship such inventory as the Seller may request to whomever the Company shall designate F.O.B. to the designated location. The Seller may set-off all or any part of said sales price against all sums owed by Distributor to the Seller and shall pay the balance within thirty

9. *See*, Ray August, *International Business Law* 484 (2nd ed., 1997).

Europe (UNECE) provides a version of a model agreement with commentary.[31] The UNECE's model agreement is intended to act as a guide providing contracting parties with a number of important provisions including the regulation of the processing and acknowledging of EDI messages, security precautions, operational requirements, and confidentiality protections.

§14.06 ELECTRONIC COMMERCE

At present, the risk in Internet commerce, especially unsecured payment systems, makes a standardized legal framework imperative. The legal framework needed for secured Internet contracting will likely involve the modification of current legal regimes.[32]

A number of issues need to be considered in electronic transactions:

> How should the law allocate the risk of garbled communication (errors in communication)? This is complicated by the fact that electronic messages may be relayed through unknown and unknowable intermediaries. When should electronic messages be considered to have legal effect [for purposes of offer and acceptance and the formation of contracts]? How should the evidentiary issues be resolved in an electronic environment? How can we ensure the integrity of electronic records?[33]

The three major concerns for international electronic contracting are authenticity, enforceability, and confidentiality. Authenticity involves the verification of the person that one is dealing with electronically. Enforceability includes the legal scope of the license granted or the warranty given under a national law. It also includes the provability and verification of the contractual terms of online transactions. Confidentiality revolves around the protection of sensitive information such as payment information and trade secrets. The fear is that the public domain nature of e-commerce makes such information susceptible to fraud and misappropriation by third parties. The minimum level of due diligence pertaining to these three concerns entails a workable knowledge of the legal requirements of forming and proving a contract formed through the Internet.[34]

31. UNECE at http://www.unece.org/tradewelcome/un-centre-for-trade-facilitation-and-e-business-uncefact/outputs/standards/unedifact/tradeedifactrules/part-2-uniform-rules-of-conduct-for-interchange-of-trade-data-by-teletransmission-uncid/part-2-uncid-chapter-4-interchange-agreement.html.
32. *See generally* Raymond T. Nimmer, *Electronic Contracting: Legal Issues*, 14 John Marshall J. Computer & Info. L. 211 (1996). *See also* Raymond T. Nimmer, *Breaking Barriers: The Relation Between Contract and Intellectual Property Law*, 13 Berkeley Tech. L.J. 827 (1998) and *Information Age in Law: New Frontiers in Property and Contract*, 68 N.Y. St. B.J. 28 (1996).
33. Linda J. Rusch, *The Relevance of Evolving Domestic and International Law of Contracts in the Classroom: Assumptions About Consent*, 72 Tul. L. Rev. 2043, 2056-2058 (1998).
34. The most secure means of Internet contracting is the entering into a trading partner agreement with a known party. *See*, Gary S. Weinstein, *Forming Contracts on the Internet*, 14 Corp. Couns. Q. 1 (1998).

The American Bar Association (ABA) has developed a *Model Electronic Data Interchange Trading Partner Agreement* that can be tailored to particular types of transactions.

The techniques that can be used to authenticate the existence of the other party and to confirm the terms of the contractual undertaking include acknowledgment of its existence, use of independent agents or value-added networks, and encryption. Acknowledgement can be through e-mail or a facsimile that confirms the online transaction. Private computer networks and electronic platforms have become a popular means to broker e-commerce. They provide the vital independent record-keeping function needed to respond to the evidentiary concerns of proving the contract in case of a future breach. Finally, encryption provides the strongest vehicle for alleviating concerns over confidentiality. The use of private and public keys enables contracting parties to secure their confidential information against theft. Ultimately the use of public key encryption to create *digital signatures* provides the means for increased e-commerce security. The ABA has published guidelines for the creation of digital signatures.[35]

The ICC published in 1997 a guide titled *General Usage for International Digitally Ensured Commerce* (GUIDEC), which addresses some of the definitional and legal aspects relating to methods aimed at overcoming e-commerce authentication and confidentiality problems. It provides a general framework for the ensuring (authenticating) and certifying of digital messages. GUIDEC is national law neutral as its goal is to harmonize legal and trade practices across national legal systems.[36] In order to do this it developed some original nomenclature and provides "clear descriptions of the rights and responsibilities of subscribers, certifiers, and relying parties." GUIDEC's operative concept of affixing a signature or verifying the author of the data message is referred to as the process of *ensuring*. The stated goals of GUIDEC are as follows:

> To enhance the ability of the international business community to execute secure digital transactions, to establish legal principles that promote reliable digital ensuring and certification practices, and to define and clarify the duties of participants in the emerging ensuring and certification system.[37]

In a digital signature system, a third-party certifier issues a certificate guaranteeing the identity of the sender of an electronic message.[38] The liability of the certifying company is contractual in nature. GUIDEC provides that the certificate should indicate its scope both in duration and transactional longevity. It should state a time period of coverage and whether it certifies a single transaction or a number of transactions. The certificate should also possess a *certification practice statement* that describes the

35. ABA's Section of Science and Technology, *Digital Signature Guidelines: Legal Infrastructure for Certification Authorities and Secure Electronic Commerce*, www.abanet.org/scitech.
36. The following has been gleaned from a review of "GUIDEC, A Living Document", accessed at www.iccwbo.org/guidec2.htm.
37. *See generally* Richard A. Horning, *Has Hal Signed a Contract: The Statute of Frauds in Cyberspace*, 12 Santa Clara Computer & High Tech. L.J. 253 (1996).
38. For a discussion of the role of certificate authorities in electronic commerce *see*, Michael Froomkin, *The Essential Role of Trusted Third Parties in Electronic Commerce*, 75 Or. L. Rev. 49 (1996).

(2) However, if the buyer is bound to take over the goods at a place other than a place of business of the seller, the risk passes when delivery is due and the buyer is aware of the fact that the goods are placed at his disposal at that place.
(3) If the contract relates to goods not then identified, the goods are considered not to be placed at the disposal of the buyer until they are clearly identified to the contract.

Article 70

If the seller had committed a fundamental breach of contract, articles 67, 68 and 69 do not impair the remedies available to the buyer on account of the breach.

Chapter V: Provisions Common to the Obligations of the Seller and of the Buyer

Section 1. Anticipatory breach and installment contracts

Article 71

(1) A party may suspend the performance of his obligations if, after the conclusion of the contract, it becomes apparent that the other party will not perform a substantial part of his obligations as a result of:
(a) a serious deficiency in his ability to perform or in his creditworthiness, or
(b) his conduct in preparing to perform or in performing the contract.
(2) If the seller has already dispatched the goods before the grounds described in the preceding paragraph become evident, he may prevent the handing over of the goods to the buyer even though the buyer holds a document which entitles him to obtain them. The present paragraph relates only to the rights in the goods as between the buyer and the seller.
(3) A party suspending performance, whether before or after dispatch of the goods must immediately give notice of the suspension to the other party and must continue with performance if the other party provides adequate assurance of his performance.

Article 72

(1) If prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach of contract, the other party may declare the contract avoided.

(2) If time allows, the party intending to declare the contract avoided must give reasonable notice to the other party in order to permit him to provide adequate assurance of his performance.
(3) The requirements of the preceding paragraph do not apply if the other party has declared that he will not perform his obligations.

Article 73

(1) In the case of a contract for delivery of goods by installments, if the failure of one party to perform any of his obligations in respect of any installment constitutes a fundamental breach of contract with respect to that installment, the other party may declare the contract avoided with respect to that installment.
(2) If one party's failure to perform any of his obligations in respect of any installment gives the other party good grounds to conclude that a fundamental breach of contract will occur with respect to future installments, he may declare the contract avoided for the future, provided that he does so within a reasonable time.
(3) A buyer who declares the contract avoided in respect of any delivery may, at the same time, declare it avoided in respect *of* deliveries already made or of future deliveries if, by reason of their interdependence, those deliveries could not be used for the purpose contemplated by the parties at the time *of* the conclusion of the contract.

Section VI: Damages

Article 74

Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.

Article 75

If the contract is avoided and if, in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement or the seller has resold the goods, the party claiming damages may recover the difference between the contract price and the price in the substitute transaction as well as any further damages recoverable under article 74.

(2) Upon the request of the party entitled to avoidance, a court may adapt the contract or term in order to make it accord with reasonable commercial standards of fair dealing.
(3) A court may also adapt the contract or term upon the request of the party receiving notice of avoidance, provided that that party informs the other party of its request promptly after receiving such notice and before the other party has acted in reliance on it. The provisions of Article 3.13(2) apply accordingly.

Article 3.11 ***Third persons***

(1) Where fraud, threat, gross disparity or a party's mistake is imputable to, or is known or ought to be known by, a third person for whose acts the other party is responsible, the contract may be avoided under the same conditions as if the behaviour or knowledge had been that of the party itself.
(2) Where fraud, threat or gross disparity is imputable to a third person for whose acts the other party is not responsible, the contract may be avoided if that party knew or ought to have known of the fraud, threat or disparity, or has not at the time of avoidance acted in reliance on the contract.

Article 3.12 ***Confirmation***

If the party entitled to avoid the contract expressly or impliedly confirms the contract after the period of time for giving notice of avoidance has begun to run, avoidance of the contract is excluded.

Article 3.13 ***Loss of right to avoid***

(1) If a party is entitled to avoid the contract for mistake but the other party declares itself willing to perform or performs the contract as it was understood by the party entitled to avoidance, the contract is considered to have been concluded as the latter party understood it. The other party must make such a declaration or render such performance promptly after having been informed of the manner in which the party entitled to avoidance had understood the contract and before that party has acted in reliance on a notice of avoidance.
(2) After such a declaration or performance the right to avoidance is lost and any earlier notice of avoidance is ineffective.

Article 3.14 ***Notice of avoidance***

The right of a party to avoid the contract is exercised by notice to the other party

Article 3.15 ***Time limits***

(1) Notice of avoidance shall be given within a reasonable time, having regard to the circumstances, after the avoiding party knew or could not have been unaware of the relevant facts or became capable of acting freely.
(2) Where an individual term of the contract may be avoided by a party under Article 3.10, the period of time for giving notice of avoidance begins to run when that term is asserted by the other party.

Article 3.16 ***Partial avoidance***

Where a ground of avoidance affects only individual terms of the contract, the effect of avoidance is limited to those terms unless, having regard to the circumstances, it is unreasonable to uphold the remaining contract.

Article 3.17 ***Retroactive effect of avoidance***

(1) Avoidance takes effect retroactively.
(2) On avoidance either party may claim restitution of whatever it has supplied under the contract or the part of it avoided, provided that it concurrently makes restitution of whatever it has received under the contract or the part of it avoided or, if it cannot make restitution in kind, it makes an allowance for what it has received.

Article 3.18 ***Damages***

Irrespective of whether or not the contract has been avoided, the party who knew or ought to have known of the ground for avoidance is liable for damages so as to put the other party in the same position in which it would have been if it had not concluded the contract.

Article 3.19 ***Mandatory character of the provisions***

The provisions of this Chapter are mandatory, except insofar as they relate to the binding force of mere agreement, initial impossibility or mistake.

Article 3.20 ***Unilateral declarations***

The provisions of this Chapter apply with appropriate adaptations to – any communication of intention addressed by one party to the other.

Article 4.102 ***Initial Impossibility***

A contract is not invalid merely because at the time it was concluded performance of the obligation assumed was impossible, or because a party was not entitled to dispose of the assets to which the contract relates.

Article 4.103 ***Mistake as to facts or law***

(1) A party may avoid a contract for mistake of fact or law existing when the contract was concluded if:
   (a) (i) the mistake was caused by information given by the other party; or (ii) the other party knew or ought to have known of the mistake and it was contrary to good faith and fair dealing to leave the mistaken party in error; or (iii) the other party made the same mistake, and
   (b) the other party knew or ought to have known that the mistaken party, had it known the truth, would not have entered the contract or would have done so only on fundamentally different terms.

(2) However a party may not avoid the contract if:
   (a) in the circumstances its mistake was inexcusable, or
   (b) the risk of the mistake was assumed, or in the circumstances should be borne, by it.

Article 4.104 ***Inaccuracy in Communication***

An inaccuracy in the expression or transmission of a statement is to be treated as a mistake of the person who made or sent the statement and Article 4.103 applies.

Article 4.105 ***Adaption of Contract***

(1) If a party is entitled to avoid the contract for mistake but the other party indicates that it is willing to perform, or actually does perform, the contract as it was understood by the party entitled to avoid it, the contract is to be treated as if it had been concluded as that party understood it. The other party must indicate its willingness to perform, or render such performance, promptly after being informed of the manner in which the party entitled to avoid it understood the contract and before that party acts in reliance on any notice of avoidance.

(2) After such indication or performance the right to avoid is lost and any earlier notice of avoidance is ineffective.

(3) Where both parties have made the same mistake, the court may at the request of either party bring the contract into accordance with what might reasonably have been agreed had the mistake not occurred.

Article 4.107 ***Fraud***

(1) A party may avoid a contract when it has been led to conclude it by the other party's fraudulent representation, whether by words or conduct, or fraudulent non-disclosure of any information which in accordance with good faith and fair dealing it should have disclosed.

(2) A party's representation or non-disclosure is fraudulent if it was intended to deceive.

(3) In determining whether good faith and fair dealing required that a party disclose particular information, regard should be had to all the circumstances, including:
   (a) whether the party had special expertise;
   (b) the cost to it of acquiring the relevant information;
   (c) whether the other party could reasonably acquire the information for itself; and
   (d) the apparent importance of the information to the other party.

Article 4.108 ***Threats***

A party may avoid a contract when it has been led to conclude it by the other party's imminent and serious threat of an act:

   (a) which is wrongful in itself, or
   (b) which it is wrongful to use as a means to obtain the conclusion of the contract, unless in the circumstances the first party had a reasonable alternative.

Article 4.109 ***Excessive benefit or unfair advantage***

(1) A party may avoid a contract if, at the time of the conclusion of the contract:
   (a) it was dependent on or had a relationship of trust with the other party, was in economic distress or had urgent needs, was improvident, ignorant. inexperienced or lacking in bargaining skill. and
   (b) the other party knew or ought to have known of this and, given the circumstances and purpose of the contract, took advantage of the first party's situation in a way which was grossly unfair or took an excessive benefit.

(2) Upon the request of the party entitled to avoidance, a court may if it is appropriate adapt the contract in order to bring it into accordance with what might have been agreed had the requirements of good faith and fair dealing been followed.

(3) A court may similarly adapt the contract upon the request of a party receiving notice of avoidance for excessive benefit or unfair advantage, provided that

Article 15 ***Review***

1. By…[4 *years after the date of application of this Regulation*], Member States shall provide the Commission with information relating to the application of this Regulation, in particular on the level of acceptance of the Common European Sales Law, the extent to which its provisions have given rise to litigation and on the state of play concerning differences in the level of consumer protection between the Common European Sales Law and national law. That information shall include a comprehensive overview of the case law of the national courts interpreting the provisions of the Common European Sales Law.
2. By…[*5 years after the date of application of this Regulation*], the Commission shall present to the European Parliament, the Council and the Economic and Social Committee a detailed report reviewing the operation of this Regulation, and taking account of, amongst others, the need to extend the scope in relation to business-to- business contracts, market and technological developments in respect of digital content and future developments of the Union acquis.

Article 16 ***Entry into force and application***

1. This Regulation shall enter into force on the 20th day following that of its publication in the *Official Journal of the European Union*.
2. It shall apply from [*6 months after its the entry into force*].

COMMON EUROPEAN SALES LAW

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